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NEW FEDERAL RULE 26: A LITIGATOR'S PERSPECTIVE

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From the perspective of an active litigator,¹ discovery as now practiced is much broader than necessary in many cases, and therefore burdens clients, lawyers and the courts with unjustified costs and delay.² It is apparent that overly broad discovery is the single most significant cause of the rising costs and delay³ rendering litigation increasingly less viable an option for dispute resolution.⁴ While it is true that many cases are litigated without substantial discovery, a number of studies, as well as personal experience, lead me to conclude that the cases in which some of the most socially and economically significant issues are litigated tend to be much too costly because of discovery problems.⁵ Those cases, in turn, place an unnecessary and unwarranted burden upon the entire judicial system.⁶

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¹ For a survey of various commentators' views on the problem of discovery, see generally D. SEGAL, *SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS* (1978).

² See McElroy, *Federal Pre-Trial Procedure in An Antitrust Suit*, 31 Sw. L.J. 649, 680-81 (1977).

³ The Pound Conference, a national conference called to commemorate the 70th anniversary of Dean Roscoe Pound's address, *The Causes of Popular Dissatisfaction with the Administration of Justice*, regarded discovery abuse as a major concern of judicial administration. See Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 279, 288 (1978).

⁴ Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 999-1000 (1980) (Powell, J., dissenting). Justice Powell emphasized that while there may be controversy over the need for extensive discovery in complex litigation, there is no disagreement "whatever about the effect of discovery practices upon the average citizen's ability to afford legal remedies." *Id.* at 999 (Powell, J., dissenting).

⁵ See, e.g., SECTION OF LITIGATION, ABA, *SECOND REPORT OF THE SPECIAL COMMITTEE FOR STUDY OF DISCOVERY ABUSE* 5 (1980).

⁶ Justice Powell recognized that the broad scope of discovery raises litigation costs to intolerable levels and "casts a lengthening shadow over the basic fairness of our legal system." Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 1001 (1980) (Powell, J., dissenting); see also American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation*, 90 F.R.D. 208, 214-15 (1981) [hereinafter cited as

This is not to suggest a lack of appreciation of the reasons for the present scope of discovery,⁷ nor to advocate a return to historically technical pleadings precluding discovery of crucial evidence until trial.⁸ The present difficulties, however, mandate substantial changes in the discovery system. The primary problem is not abuse in the sense that lawyers are requesting discovery to which they are not entitled or resisting discovery to which their opponent is entitled. The problem is more fundamental and lies in the scope and breadth of discovery allowed by the Federal Rules of Civil Procedure.⁹

The historical literature surrounding the adoption of the federal rules in 1938 makes very clear that the intention of the draftsmen was to encourage very broad discovery.¹⁰ The draftsmen contemplated that anything remotely relevant would be discoverable, and that the admissibility of the information would not be determinative of its discoverability.¹¹ The federal rules relating to dis-

Complex Litigation].

⁷ Prior to the enactment of the Federal Rules of Civil Procedure in 1938, the only federal provision aimed at discovery, Equity Rule 58, was extremely awkward and narrow. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 19-22 (1938); see also Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 220-21 (1978).

⁸ The Supreme Court summarized the problems of the pre-federal rule system: "Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method." *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).

⁹ Former Attorney General Griffin B. Bell expressed the view to the Standing Committee on Rules of Practice and Procedure that "the scope of discovery is far too broad." Letter from Griffin B. Bell to the Honorable Roszel C. Thomsen, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference 1 (June 27, 1978), *quoted in* Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 999 n.5 (1980) (Powell, J., dissenting); see also SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, ABA, REPORT TO THE BENCH AND BAR: PROPOSED CHANGES IN THE FEDERAL RULES OF CIVIL PROCEDURE 3 (1977).

¹⁰ See, e.g., Pike & Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 297-301 (1940); Pike & Willis, *New Federal Deposition—Discovery Procedure*, 38 COLUM. L. REV. 1179, 1186-98 (1938) [hereinafter cited as Pike & Willis, *New Procedure*]; Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737-39 (1939).

¹¹ One commentator has observed: "The draftsmen held a utopian combination of hopes about the gains from discovery. They expected that the exchange of information between the litigants would bring to the Court more facts, better reasoned arguments, and a fuller knowledge of the merits of the suit." W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 234 (1968); see also *Leach v. Greif Bros. Cooperage Corp.*, 2 F.R.D. 444, 446 (S.D. Miss. 1942) ("Rules 26 to 37 inclusive were formulated with the view of granting the widest latitude in ascertaining before trial facts concerning the real issues in dispute and to eliminate as much as possible all expense and difficulty that could be involved in the procuring of documents at the trial").

covery were deliberately drafted to embody that expansive concept of discovery, and presently reflect an evolution in procedure from game playing to truth seeking.¹² For this reason, the rules were widely praised by the commentators and judges of the time.¹³

That federal courts have since interpreted these rules to permit liberal discovery is not a perversion of the spirit behind them. Rather, the courts have fulfilled the intention of the draftsmen.¹⁴ In early cases, such as *Hickman v. Taylor*,¹⁵ decided not long after the adoption of the rules, the concept of broad discovery was clearly considered a benefit to the judicial process.¹⁶ The amendments adopted at various times since 1938 have continued in the same vein.¹⁷

The result is a large number of cases in which lawyers, simply by using the discovery to which they are entitled, obtain tremen-

¹² According to Professors Wright and Miller, the federal rules "sought to put an end to the 'sporting theory of justice', by which the result depends on the fortuitous availability of evidence or the skill and strategy of counsel." 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2001, at 18-19 (1970); see *In re Halkin*, 598 F.2d 176, 192 (D.C. Cir. 1979); *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 56 (9th Cir. 1961); *Teller v. Montgomery Ward & Co.*, 27 F. Supp. 938, 941 (E.D. Pa. 1939).

¹³ See *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.*, 30 F. Supp. 275, 277 (D. Md. 1939); *Pike & Willis, New Procedure*, *supra* note 10, at 1452, 1458.

¹⁴ See, e.g., *Nichols v. Sanborn Co.*, 24 F. Supp. 908, 911 (D. Mass. 1938) ("[t]o keep in step with the purpose and spirit underlying the adoption of these rules it is better that liberality rather than restriction of interpretation be the guiding principle").

¹⁵ 329 U.S. 495 (1947). The *Hickman* case involved the scope of discovery with respect to an adverse party's pretrial preparation. In expressing its enthusiasm for the openness of the new approach, the Supreme Court declared that discovery "is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant." *Id.* at 507. This widespread availability, announced the Court, meant that "civil trials in the federal courts no longer need be carried on in the dark." *Id.* at 501 (citation omitted).

¹⁶ See, e.g., *id.* ("[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation").

¹⁷ Substantial amendments to the discovery rules were made in 1948, with minor amendments made in 1949, 1963 and 1966. 8 C. WRIGHT & A. MILLER, *supra* note 12, § 2002, at 21. Major revisions were proposed in 1967, which, with substantial modifications, were adopted in 1970. See *Federal Rules of Civil Procedure Amended Rules*, 48 F.R.D. 459 (1970). Among the changes implemented in 1970 were the elimination of a showing of "good cause" for the production of documents and the revision of rule 34 "to have it operate extrajudicially, rather than by court order." Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 526-27, Rule 34 advisory committee note (1970). The Advisory Committee noted that a number of the changes in the mechanics of discovery were "designed to encourage extrajudicial discovery with a minimum of court intervention." *Id.* at 488. Professor Rosenberg has stated, "[t]he thought was that the regulation of discovery should be more a matter of lawyer self-discipline and mutual exchange and less a matter that would automatically take you to court." Rosenberg, *Discovery Abuse*, 7 LITIGATION 8, 8 (Spring 1981).

dous numbers of documents and take depositions interminably, permitting cases to become mired in the discovery process.¹⁸ Judge Pollack once catalogued the complaints in this area: "unnecessary and irrelevant depositions"; "staggering and monstrous interrogatories"; "ulterior purposes are sought to be served, other than meritorious discovery purposes"; "information is sought for embarrassment"; "the process is being excessively used, out of proportion to the size of the case, to the values involved and to the information to be obtained"; and "the discovery process is used indefinitely in support of a mere hunch of suspicion of a cause of action or defense."¹⁹ One side in litigation will discover every conceivable piece of information that is relevant not only to the issues as framed, but to the subject matter of the litigation, regardless of the information's admissibility as evidence.²⁰ The other side naturally will resist such broad discovery, particularly when his opponent is pushing to the outer limits of discovery. As those limits are approached, it is not inappropriate for opposing counsel to object and move for protective orders so as to define what the limits are.²¹ While there are instances in which lawyers make improper discovery requests under the rules or resist information that is clearly discoverable, it is suggested that this does not represent the critical problem with the discovery process. The most significant discovery problem is that the tools are so vast and the scope so broad that even obtaining the information to which a party is legitimately entitled under the rules has become a wasteful, time-consuming, dilatory,

¹⁸ Judge Aldisert stated that "the average litigant is overdiscovered, overinterrogated, and overdeposed." Pollack, *supra* note 7, at 222 (quoting Judge Aldisert).

¹⁹ *Id.*

²⁰ See Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 454, Rule 26 advisory committee note (1946) (a preliminary inquiry of admissibility to determine proper scope of discovery would "unnecessarily [curtail] the utility of discovery practice"). Analyzing the cause of the expansive use of discovery, one commentator observed:

[I]n an adversarial situation, information is an asset: instead of concluding that the adversary's position is just and strong, each side may think that it can gain victory from the new information. Consequently trials do not seem to diminish in number, become more orderly, or become shorter. The total judicial system may be better off because of the greater amount of information before the court, but it may have acquired these gains at additional net costs in work and money.

W. GLASER, *supra* note 11, at 234.

²¹ Rule 26(c), which empowers the court to fashion a wide variety of orders for the protection of parties and witnesses in the discovery process, was adopted to safeguard against the abuse of the broad discovery permitted under 26(b). 8 C. WRIGHT & A. MILLER, *supra* note 12, § 2036, at 267.

and expensive process.²²

The Judicial Conference has proposed a two-part remedy for the problem.²³ One aspect changes the substantive standard of discovery and is contained in rule 26(b);²⁴ the other, embodied in rule 26(g), concerns enforcement.²⁵ The change in the substantive standards of rule 26(b) is highly beneficial. The core of the change is the new rule 26(b)(1)(iii), pursuant to which discovery of even relevant material would be limited by weighing the benefit of obtaining the material against the burden, cost and delay in collecting the information.²⁶ Rule 26(b)(1)(iii) permits the court to limit or prohibit discovery if the court determines that "the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."²⁷

Rule 26(b)(1)(iii) is an entirely new concept in the federal rules. Under the old rule, if material was relevant to the subject matter and not privileged, a party was entitled to obtain it regardless of how burdensome to the other party, and regardless of how marginal its relation to the subject matter of the case.²⁸ Although

²² The Supreme Court, in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), stated:

[T]o the extent [the discovery process] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Id. at 741; see *McElroy*, *supra* note 2, at 680-81.

²³ See U.S. JUD. CONF., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (1982) RULE 26(b), (g) [hereinafter cited as PROPOSED AMENDMENTS], (adopting as amended COMM. ON RULES OF PRAC. AND PROC., U.S. JUD. CONF., PRELIMINARY DRAFT OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (1981)), reported in *Nat'l L.J.*, Oct. 11, 1982, at 13, col. 1, and *N.Y.L.J.*, Sept. 29, 1982, at 1, col. 2.

²⁴ See PROPOSED AMENDMENTS, *supra* note 23, Rule 26(b).

²⁵ See *id.* Rule 26(g).

²⁶ The changes in rule 26(b) are "intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451, 481, Rule 26 advisory committee note (1981).

²⁷ PROPOSED AMENDMENTS, *supra* note 23, Rule 26(b)(1)(iii).

²⁸ FED. R. CIV. P. 26(b)(1). The advisory committee note on the 1946 amendments emphasized the broad scope of discovery and stated that the standard for the permissible scope of discovery was not the admissibility of the information produced, but rather, the usefulness of the examination in leading to useful information. Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, *supra* note 20, at 454, Rule 26 advisory committee note. The Committee stated that "to the extent that the examination develops useful information, it functions successfully as an instrument of dis-

some federal judges have limited discovery when they thought that the burden imposed was outweighed by the materiality of the information to be obtained, the rules did not expressly sanction such limitations.²⁹ Those cases reflect a practical response to the federal rules and do not comport with the draftsmen's notes or the initial cases.³⁰

While the newly adopted rule 26(b) effectuates a major, salutary change in the law of discovery, it must be recognized that the rule is subjective, leading to difficulty in application. Deciding whether information is relevant to a case is relatively easy to ascertain; whether the "burdensomeness" of collecting the information outweighs its utility is a much more difficult determination.³¹

The procedural aspect of the Judicial Conference proposal contained in rule 26(g) relates to certifications and sanctions.³² There are essentially three items that a lawyer would have to certify: first, that the discovery or his resistance to it is warranted under either the existing law or the law as he fairly believes it can be changed; second, that the discovery is not sought for an improper purpose; and third, that the discovery is not unreasonable, unduly burdensome or expensive given the needs of the case.³³ The sanctioning mechanism perhaps will have the greatest impact on discovery. Under present rule 37, sanctions are generally imposed upon lawyers only for "dilatory or recalcitrant discovery."³⁴ Sanc-

covery, even if it produces no testimony directly admissible." *Id.*

²⁹ See, e.g., *K.S. Corp. v. Chemstrand Corp.*, 203 F. Supp. 230, 235 (S.D.N.Y. 1962). In *Alexander v. Rizzo*, 50 F.R.D. 374 (E.D. Pa. 1970), the court undertook a balancing approach and determined that the "burdensomeness" of compiling the requested information was outweighed by the "necessity" of the information to the plaintiff. *Id.* at 376. The test employed was not relevancy, or whether the discovery was so abusive that justice required the court to issue a protective order, but rather, whether the necessity was sufficient to warrant imposition of the burden. See *id.*

³⁰ In swinging the pendulum so far away from the "no discovery" system to the broad discovery provision of the federal rules, the draftsmen did not seriously confront the issue of limitations on discovery until practical experience began to reveal the difficulties of liberality. See Holtzoff, *Desirability of Amending The Federal Rules of Civil Procedure*, 2 F.R.D. 495, 498-99 (1942). Holtzoff suggested that while the federal rules had made an "outstanding contribution" to discovery, "[a] very serious and a very important question has arisen as to the limits which such discovery should be permitted to reach." *Id.* at 498.

³¹ See Friedenthal, *Herbert v. Lando: A Note on Discovery*, 31 STAN. L. REV. 1059, 1062-64 (1979); Flegal & Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U. L. REV. 597, 608; Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 122 (1962).

³² PROPOSED AMENDMENTS, *supra* note 23, Rule 26(g).

³³ *Id.*

³⁴ Epstein, Corcoran, Krieger & Carr, *An Update on Rule 37 Sanctions after National*

tions, pursuant to the Judicial Conference changes, will be imposed to police the important substantive change contained in rule 26(b)(1)(iii).³⁵ Unfortunately, it appears that rule 26(g) is both unusable and harmful. Because the rule creates such a nebulous, subjective standard, the courts will most probably either not issue sanctions at all, or issue them only in the most extreme cases.³⁶ Even if the sanctions are employed, they will be imposed in an after the fact, ad hoc manner. Since subjective standards will perforce be applied differently by various judges, the results will be uneven and unfair. Moreover, it is inherently unjust for sanctions to be imposed after the fact when the standard is unclear and undefined.

Problems even more fundamental are apparent. The entire issue of sanctions will become another element in the tactical strategy of litigation. A motion to impose sanctions will be made for the same reasons as, for example, motions to disqualify lawyers currently are made.³⁷ The effect will proliferate still more satellite litigation, imposing greater expense on the parties and greater burdens on the court's time than ever before.³⁸

Finally, the recently adopted amendments impose upon the lawyer an obligation that is inconsistent with his role as an advocate and representative of his client.³⁹ It is incongruous to require

Hockey League v. Metropolitan Hockey Clubs, Inc., 84 F.R.D. 145, 171 (1980). Rule 37 "provides generally for sanctions against parties or persons unjustifiably resisting discovery." Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, *supra* note 17, at 538, Rule 37 advisory committee note; *see, e.g.*, Barker v. Bledsoe, 85 F.R.D. 545, 548-49 (W.D. Okla. 1979) ("the Court has wide discretion in applying sanctions to protect the pretrial discovery process"). As currently employed, however, rule 37 sanctions "show no evidence of being able to control the abuses attendant upon excessive and burdensome discovery." Epstein, Corcoran, Kreiger & Carr, *supra*, at 171.

³⁵ Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 280-82 (1982).

³⁶ Traditionally, judges have shown a marked reluctance to impose sanctions for discovery abuse. *See* Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 789, 862-63; *see also* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 2 REV. LITIGATION 71, 79-83 (1981). To overcome this judicial reluctance, the 1970 amendment of rule 37 changed the word "refusal" to "failure," indicating that a finding of wilfulness was not a prerequisite for the imposition of sanctions. *See* Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, *supra* note 17, at 540, Rule 37 advisory committee note.

³⁷ *See* Jordan, *Disqualifying Lawyers*, 7 LITIGATION 3, 3 (Spring 1981).

³⁸ The Advisory Committee notes acknowledge that "the cost of satellite litigation over the imposition of sanctions" could offset the benefit gained by mandating strict sanction rules. PROPOSED AMENDMENTS, *supra* note 23, rule 11 advisory committee note.

³⁹ *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1978). Professor Thode

a lawyer to advise his client that, although the information is relevant, material, and may be helpful in formulating his case, the information should not be sought because it would be too burdensome on the other party.⁴⁰ It would be equally incongruous to require him to certify that this is not the case. The rule's requirement conflicts with the traditional function and role of lawyers in the adversary system, and ultimately, will undermine the lawyer's obligation to represent his client. The rule also will handicap the lawyer's effectiveness in uncovering facts and bringing them to light in court.⁴¹ For all these reasons, the enforcement aspect of the rule is ineffective and, essentially, counterproductive.

What alternatives are available? It appears that rule 26(b)(1)(iii) should be adopted and a concept of weighing the need of against the burden of discovery should be implemented. The enforcement, however, should be accomplished not by requiring lawyers to certify, but through active judicial intervention. Judges should involve themselves early in their cases, monitoring them closely, refining discovery where appropriate, and forcing cases to trial promptly.⁴² Rather than 26(g) as now adopted, a new rule should have a mandatory requirement that federal judges monitor discovery closely from the beginning of the case and be familiar enough with the facts to make the necessary judgments concerning

has stated, "[a]ny persuasion or pressure on the advocate which deters him from planning and carrying out the litigation on the basis of 'what, within the framework of the law, is best for my client's interest?' interferes with the obligation to represent the client fully within the law." Thode, *The Ethical Standard for the Advocate*, 39 Tex. L. Rev. 575, 584 (1961).

⁴⁰ Requiring that a lawyer either exercise restraints in carrying out discovery on his client's behalf or be sanctioned, interferes with the attorney's obligation of undivided allegiance to his client. The full participation of a lawyer in his role as a partisan advocate touches "the integrity of the adjudicative process itself." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958). The obligation to represent the client fully within the law "is the heart of the adversary process." Thode, *supra* note 39, at 584.

⁴¹ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 (1978) ("advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments"); see also *Professional Responsibility: Report of the Joint Conference*, *supra* note 40, at 1160-61 (basis of partisan advocacy is that "[e]ach advocate comes to the hearing prepared to present his proofs and arguments").

⁴² Judge Kaufman warned in 1960 that "[t]he adjudication of a case in the federal courts should be seen as a process continuing from the date of filing to the date of final decree." Kaufman, *supra* note 31, at 125. In urging judicial control to prevent subversion of the benefits of the liberal discovery rules, Judge Kaufman observed, "[t]he duty of the Courts does not arise only during that last act [the 'courtroom scene'], but extends the entire expanse of the script." *Id.*

all the aspects of permissible discovery. Strong judicial management of cases is the only way to impose an effective limit on discovery.⁴³

These suggestions are not aimed at any institutional changes in discovery, but merely attempt to deal with what will arise in the foreseeable future. The solution would require a substantial commitment of judicial time.⁴⁴ Obviously, to determine whether to halt discovery, a judge would have to expend much time and effort to understand the case. If he is not sufficiently familiar with the case, then he is likely to err on the side of allowing discovery out of concern for disallowing needed discovery. As a result, a full understanding of the issues and the facts of a case would be a prerequisite for the proper execution of the judge's new role. On balance, however, the effort seems worthwhile because of the long-term saving in time and resources.⁴⁵

The principal difficulty with this solution is that many federal judges are reluctant to assume a firm and active role in policing the progress of a case. Judge Pollack has remarked perceptively:

Most judges do not like to become overly involved with discovery matters. The Courts are reluctant to become involved with the factual development of a case. The Courts have by and large either abdicated or lost control of the pre-trial discovery phases of complex cases. Consequently, cases take shape without judicial management. Judges stand aloof and prefer the solitude and loftiness of dealing with "legal" matters, ignoring the cardinal circumstance that the facts invariably shape the legal result—whether through settlement or trial.⁴⁶

Judge Pollack is correct. Unfortunately, too many federal judges would prefer to write 150-page opinions on constitutional issues which ultimately will be resolved by appellate courts than with delving into the nitty-gritty of the facts of all the cases that are

⁴³ See *Complex Litigation*, *supra* note 6, at 211 ("[f]irm judicial control of complex cases is essential"); Flegal & Umin, *supra* note 31, at 615 ("the judge provides the back-stop"); Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543, 562 (1980) ("[s]upervision and guidance from the court is, again, the only answer" to the problems of discovery); Note, *Excessive Discovery in Federal and Illinois Courts: A Tool of Harassment and Delay?*, 11 LOY. U. CHI. L.J. 807, 824 (1980) (urging judicial intervention in the discovery process).

⁴⁴ *Complex Litigation*, *supra* note 6, at 220, 224.

⁴⁵ See *id.* at 210; Kaufman, *supra* note 31, at 125.

⁴⁶ Pollack, *supra* note 7, at 223.

before them.⁴⁷ One option is to utilize magistrates for some of this work, although they are likely to be less effective than trial judges in discovery management.⁴⁸ Magistrates simply have neither the stature nor the ultimate decisionmaking authority to assert the influence necessary to curb discovery excesses.⁴⁹ From personal experience, nothing is as effective as the judge who is ultimately going to try the case sitting down with the parties in a pretrial conference, reviewing discovery, and, when necessary, confronting a lawyer as to the necessity of required information.⁵⁰

⁴⁷ See Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203 (1976). It has been noted that judges often “throw up their hands” at the sight of massive discovery requests, and resort to granting blanket access to a party’s records in order to avoid the necessity of examining each and every document. *Id.*

⁴⁸ See Note, *Federal Rules of Civil Procedure: Defining a Feasible Culpability Threshold for the Imposition of Severe Discovery Sanctions*, 65 MINN. L. REV. 137, 151-53 (1980). The district judge’s scope of review of the magistrate’s decision in discovery disputes is limited to a “clearly erroneous or contrary to law” standard. See *Citicorp v. Interbank Card Ass’n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979); *Sherrell Perfumes, Inc. v. Revlon, Inc.*, 77 F.R.D. 705, 707 (S.D.N.Y. 1977); 28 U.S.C. § 636(b)(1)(A) (1976).

⁴⁹ See Pollack, *supra* note 7, at 223. Judge Pollack commented that the trial judge “is the natural monitor to be looked to,” and that “to consign lawyers to a busy magistrate for management purposes is like an artist leaving it to an apprentice to fill in the outlines and background of a painting.” *Id.* In surveying practicing attorneys, Professor Brazil found that “[t]he most vitriolic criticisms were directed toward magistrates in the federal courts.” Brazil, *Views from the Front Lines: Observations by Chicago Lawyers about the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 217, 246. He noted that “a great many . . . lawyers vehemently complained that most of the magistrates are woefully underequipped in talent, time, and temperament to resolve the complex discovery disputes that are referred to them.” *Id.*

⁵⁰ As Judge Pollack observed, “[i]n the oral interchange [of an informal conference with the judge]—eyeball to eyeball—it is rare that a lawyer will attempt to go beyond the framework of what his case or defense is about.” Pollack, *supra* note 7, at 224.